

ICO Call for Views: Direct Marketing Code of Practice

Q1 The code will address the changes in data protection legislation and the implications for direct marketing. What changes to the data protection legislation do you think we should focus on in the direct marketing code?

a) Legitimate Interests:

The new direct marketing code needs to provide clarity in respect to the extent that Data Controllers can rely on legitimate interests as a lawful basis to conduct direct marketing. The code needs to provide equal weighting to: (i) the use of the soft-opt in exemption under the Privacy & Electronic Communications Regulation (PECR) to conduct electronic marketing and (ii) reliance on legitimate interests as valid methods of conducting direct postal or telephone marketing, as it does upon the importance of relying upon consent.

Media coverage of GDPR has perpetuated the misunderstanding that consent is required for direct marketing to be conducted. The ability of a Data Controller to rely on legitimate interests needs to be specifically covered in the direct marketing code. The current direct marketing code of practice does not clearly set out the role of legitimate interests. Greater clarity in the code will lead to clearer expectations of data subjects.

The ICO clearly recognise in their GDPR Legitimate Interests guidance that legitimate interests are a valid legal basis to conduct postal and phone direct marketing, and that legitimate interests can also be relied upon to conduct electronic direct marketing if the Soft-opt in exemption under PECR applies. This position needs to be clearly emphasised in the updated direct marketing code of practice. The existing table in the ICO's GDPR Legitimate Interests guidance clearly defines when that legitimate interests can be utilised under GDPR for direct marketing purposes, and this table should be replicated in the ICO's direct marketing code to enhance transparency and ease of reference.

The code should also include a clear explanation on the rules regarding the ability for firms to use either opt-out or opt-in as a legitimate method for collecting marketing preferences of individuals, and to be able to rely on legitimate interests to send customer satisfaction surveys. The code would also greatly benefit from clarity from the ICO as to their expectations on the use of Legitimate Interest Assessment templates to formally document the balancing test assessment.

b) Definition of 'direct marketing'

The direct marketing code should also take the opportunity to refine and provide greater clarity in respect to the definition of 'direct marketing.' This should be supported with clear examples as to which activities would fall under the definition, and what would not. The current definition is so broad that any communication that contains more information than just confirmation of insurance cover purchased could technically be deemed as direct marketing, if taken in the absolute context of the definition. This poses several operational challenges for organisations attempting to deliver important messages to their customers, and makes compliance with other regulatory obligations (FCA rules on treating customer fairly) more difficult.

Q2 Apart from the recent changes to data protection legislation are there other developments that are having an impact on your organisation's direct marketing practices that you think we should address in the code?

Yes

Q3 If yes please specify

As a general insurer, we are required to comply with rules introduced by the Financial Conduct Authority and the newly introduced Insurance Distribution Directive. These rules place a strong focus on delivering the right outcomes for consumers. The interpretation of direct marketing rules can cause uncertainty, where a firm delivers a communication with a customer designed to meet FCA objectives which could technically be deemed to be 'direct marketing'. As well as the rules listed below the FCA are also focusing on vulnerable customers, pricing practises and general inertia at renewal which leads to some consumers being disadvantaged. The FCA have recently introduced the following rules:

The customer's best interests rule

ICOBS 2.5.-1 A firm must act honestly, fairly and professionally in accordance with the best interests of its customer.

Product Information (ICOBS 6)

Ensuring customers can make an informed decision: the appropriate information rule

ICOBS 6.1.5

(1) A firm must ensure that a customer is given appropriate information about a policy in good time and in a comprehensible form so that the customer can make an informed decision about the arrangements proposed.

(3) Appropriate information is both objective and relevant information, and includes IPID information.

(4) Where the firm is proposing a policy (including if appropriate on renewal) 'in good time' means in good time prior to the conclusion of the policy.

ICOBS 6.1.6 G 01/10/2018

The appropriate information rule applies:

(1) at all of the different stages of a contract and includes pre-conclusion and post-conclusion, and also when mid-term changes and renewals are proposed;

Renewals

ICOBS 6.5.1

(c) a statement alongside (a) and (b) indicating that the consumer:

(i) should check that the level of cover offered by the renewal is appropriate for their needs; and

(ii) is able, if they so wish, to compare the prices and levels of cover offered by alternative providers.

Insurers should be able to provide information during the lifecycle of an insurance contract, especially at renewal, that they feel is appropriate to ensure that a consumer can make an informed decision as to whether the insurance cover is or continues to be right for them. To achieve this aim it is likely that insurers will need to inform individuals of newly introduced services or products, which may not be related to the existing product (or included as part of the existing product) purchased by an individual. It has proven challenging to meet FCA requirements and provide appropriate information to customers who have opted out of receiving direct marketing. If a communication is considered to be 'direct marketing,' then it is not possible to send it to individuals who have opted-out. This exposes firms to the risk of failing to provide all customers with sufficient information to enable them to make an informed decision that they have the right insurance in cover in place that meets their needs, and are not disadvantaged because of the failure to receive a communication.

Example 1: We launched a new home insurance product which offered enhanced insurance cover from our existing standard product. We issued a communication in their renewal pack to existing home insurance customers informing them of the new product, where we had identified that they would benefit from receiving information about the newly introduced enhanced home insurance cover. These customers would be able to obtain home insurance with more extensive coverage for potentially a lower premium at renewal. The communication was deemed by the ICO as direct marketing following a complaint from one individual.

The communication was issued to individuals, as we were aiming to act in their best interest and inform them of all the options available at renewal. Without providing information about our new home insurance product, we cannot state that we have provided all information to enable a customer to make an objective comparison about their insurance cover. Consumers would reasonably expect a firm to advise them of better or cheaper cover at the point of negotiating a new contract and would not wish to be disadvantaged financially because they opted out of marketing.

As illustrated above, a complaint from one individual (often a professional complaint seeking compensation) resulting in an ICO finding that a communication is technically direct marketing, can negatively impact our communication strategy leading to the potential disadvantage of other customers. It is imperative that the ICO understand the consequences of declaring that a communication is 'direct marketing', as it can put firms in a difficult position in trying to meet other regulatory obligations. This is particularly true regarding FCA rules, which are principle based and it is difficult to pinpoint an exact FCA rule mandating the issuing of a particular communication. The issuing of an individual communication will not be specifically mandated by the FCA, but the communication will be issued to meet FCA principles. Communications issued are a judgement call from firms who will have a clear rationale as to why a communication helps to deliver compliance with FCA principles and rules.

Example 2: Our pet insurance customers can sign up to a service called Pet Drugs Online (an online pet medication service) to enable them to obtain cheaper medication for their pets. This is a service that our competitors do not provide and provides reimbursement for prescription costs and pet medication at a lower cost than vets. This is something that we believe the FCA would expect us to make our customers aware of. However, under direct marketing rules the communication would likely to be deemed 'direct marketing,' as it is not essential to the product purchased (customers can have pet insurance without using the service), and we would be communicating a third-party service to customers. This is a challenging situation to resolve and likely to result in us failing to meet all of our regulatory obligations. If this communication is only sent to people who have opted-in to marketing then we are potentially disadvantaging opt-out customers who are likely to be financially worse off by not receiving the communication. Without being aware of the service, it will be very challenging to demonstrate that we have provided a consumer with all information to allow them to assess that a product provides cover that better suits their needs.

Q4 We are planning to produce the code before the draft e-Privacy Regulation (ePR) is agreed. We will then produce a revised code once the ePR becomes law. Do you agree with this approach?

Yes. There is considerable uncertainty as to when the ePR will be introduced as law in the UK, particularly with complications from Brexit timescales and lack of clarity as to the UK Government's intentions on updating electronic communications legislation.

It is important that the ICO clearly articulate their expectations for firms in this area, given that substantial resource would be required to implement any ePR changes. Clarification as to ICO expectations following GDPR application of consent requirements to PECR, particularly cookies will be useful. It is difficult to see how valid GDPR 'consent' for cookies can be achieved which would meet all GDPR requirements.

Q5 If no please explain why you disagree

Not applicable.

Q6 Is the content of the ICO's existing direct marketing guidance relevant to the marketing that your organisation is involved in?

Yes. As a general insurer, we will process personal data for direct marketing purposes. We have highlighted in our response where improvements can be made to enhance relevancy to our processing activities.

Q7 If no what additional areas would you like to see covered?

The relationship to FCA rules on treating customers fairly, where communications with customers could be construed as technically direct marketing communications. The purpose behind a communication should also be considered, and impact on adhering to other regulatory obligations.

The application of GDPR and PECR rules to digital and online behavioural advertising will be welcome addition to the code, particularly in addressing targeted advertising; advertisements on websites; analytic; tracking and cookies.

Q8 Is it easy to find information in our existing direct marketing guidance?

Yes. The layout is easy to navigate. There are areas which would benefit from heightened prominence within the guidance, such as the ability of organisations to rely up legitimate interests to conduct direct marketing. It and would be beneficial to replicate sections relating to direct marketing from ICO's legitimate interests guidance needs to be replicated in the code, as the current table is clear and concise.

Q9 If no, do you have any suggestions on how we should structure the direct marketing code?

Not applicable.

Q10 Please provide details of any case studies or marketing scenarios that you would like to see included in the direct marketing code.

Examples for the use of legitimate interests to conduct direct marketing would be beneficial. Examples and scenarios of communications that the ICO feels would be deemed to be 'direct marketing' and those that would not. It would be extremely useful for financial services firms to have a scenario outlining how communications to meet FCA obligations can be made to customers who have opted-out of direct marketing. A scenario covering the use of marketing in account portals would be useful.

Q11 Do you have any other suggestions for the direct marketing code?

The ICO could further assist individuals by clarifying their position on legitimate interests and direct marketing in the 'Your data matters' sections of the ICO website to aid with the understanding of data subject and to set realistic expectations.

About you

Q12 Are you answering these questions as?

- A public sector worker
- A private sector worker
- A third or voluntary sector worker
- A member of the public
- A representative of a trade association
- A data subject
- An ICO employee
- Other

If you answered 'other' please specify:

Q13 Please provide the name of the organisation that you are representing.

Q14 We may want to contact you about some of the points you have raised. If you are happy for us to do this please provide your email address:

Thank you for taking the time to share your views and experience